BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 34(a)(1)	)	
of the Public Utility Holding Company	)	GC Docket No. 96-101
Act of 1935, as added by the	)	
Telecommunications Act of 1996	)	

To: The Commission

REPLY COMMENTS OF
THE SOUTHERN COMPANY

Respectfully submitted,

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Dated: July 5, 1996

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EXECUTIVE SUMMARY

In its Comments filed in this proceeding, Southern supported the Commission's rules as an appropriate implementation of the provisions of Section 34 of PUHCA, as amended by the Telecommunications Act of 1996. Southern notes that, while many of the comments were also in agreement with the Commission's approach, a number of the Commenters have urged the Commission to adopt measures which would exceed the statutory mandate of Section 34(a)(1) or the scope of this proceeding or are otherwise extraneous to the ETC application process.

Congress envisioned a streamlined ETC application process, administered solely by the FCC, to promote rapid entry and vigorous competition in the telecommunications market by ETC's. Accordingly, Commenters' suggestions that the FCC or the states should conduct a public interest inquiry as part of the ETC application review process are not supported by the statute and would defeat the purpose of Section 34(a)(1). Further, Comments which argue that ETC status should be conditioned upon state approval or compliance with other federal or state laws or regulations are also misplaced and should be disregarded by the Commission.

Southern also opposes, as beyond the scope of this proceeding, Comments which seek to impose onerous reporting or

disclosure requirements upon ETCs as beyond the scope of the rulemaking and without any statutory or other basis, or which seek to equate ETC's with local exchange carriers. Additionally, Southern opposes the suggestion that ETC's should be required to actually engage in qualifying activities following grant of ETC status; instead, Southern supports the FCC's earlier articulated position that an ETC need only be established for the purpose of providing qualifying services at the time of filing its application to be "engaged" in such activities under Section 34.

Finally, Southern opposes the proposal that a notice and comment period be built into the rules regarding material changes in the circumstances underlying ETC status. Such a provision is unnecessary and could be used to hinder ETCs in their business activities.

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The Southern Company (Southern) by and through counsel and pursuant to Section 1.415(c) of the Federal Communications Commission's (FCC or Commission's) Rules (47 C.F.R. Section 1.415(c)), submits these Reply Comments in response to the Comments filed in the above captioned rulemaking proceeding.

I. BACKGROUND

1. By a Notice of Proposed Rulemaking (NPRM) adopted and released April 25, 1996, the FCC has requested comment on its proposals for implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935 (PUHCA), as amended by the Telecommunications Act of 1996 (Pub L No. 104-104, 110 Stat. 56 (1996) (1996 Act). Southern filed Comments in this proceeding generally supporting the FCC's proposals while requesting clarification of the application of the proposals concerning

required notice in the event of a material change in circumstances.

II. GENERAL STATEMENT

2. In light of the substance of the Comments filed by other parties to this proceeding, Southern feels that certain general statements regarding the scope of this rulemaking, and of Section 34(a)(1), are warranted at the outset. It is clear from the terms of the FCC's NPRM that it deals only with PUHCA Section 34(a)(1) and, in particular, (1) the appropriate scope of public comment and FCC review in the application process, (2) multi-party filing under one application, (3) service of ETC applications and notification of ETC determination, (4) the period for review of applications, and (5) ETC notification requirements in the event of a change in the circumstances which underlie ETC status. Although Section 34 in general deals with several different aspects of ETC status, those aspects are not at issue in this proceeding.

3. Further, the FCC's statutory authority, as set forth in Section 34(a)(1), is limited; under that section, the FCC is responsible only for using its expertise to determine if the ETC applicant has set forth in its application activities which fall within the qualifying categories and for notifying the Securities and Exchange Commission of ETC determination. Section 34(a)(1)

does not contemplate any other function, nor that any other entity will play a role in determining eligibility for ETC status. The FCC's proposed rules, and the scope of this proceeding, are consistent with the authority granted by Section 34(a)(1) and with Congressional intent. Accordingly, Southern urges the FCC to adopt the proposed rules.

1. ETC Applications

A. Scope of FCC Review/Public Comment

4. Southern agrees with those Commenters who support the FCC's proposal for a limited scope of agency review and public comment in the application process. Cinergy at 2; Entergy at 5. The FCC's proposal correctly implements the plain language of Section 34(a)(1) and furthers Congressional intent underlying Section 34 in general. The process of obtaining ETC status, as contemplated under Section 34(a)(1), clearly should be straightforward and limited to a determination of whether the applicant's business activities fall within the qualifying categories.

5. Several of the parties have suggested in their Comments that it would be appropriate for the Commission and/or the states to consider public interest issues as part of the ETC application review process. Comments of American Communications Services, Inc. (ACSI) at 10; Cincinnati Bell Telephone (CBT) at 2-3.

Commenters have also suggested that grant of ETC status should be conditioned upon certification and compliance with the nondiscriminatory pole access provisions in the 1996 Act, Comments of ACSI at 8-9; the Association for Local Telecommunications Service (ALTS) at 3-4; CBT at 5, or with the cross-subsidization safeguards, or other state regulatory matters contained in Section 34. Comments of CBT at 5; City of New Orleans at 7-9.

6. The Commission has no authority under Section 34(a)(1) to impose these type of onerous conditions on applicants for ETC status. These proposals are, furthermore, inconsistent with Congressional intent and, in many cases, have been rejected by the FCC previously.[1/] As discussed above, and as the Commission is well aware, the application review process must, in accordance with the terms of Section 34(a)(1) be limited to a discrete inquiry by the Commission concerning the nature of the activities which the applicant proposes to engage in. That the Commission's proposal in this regard is consistent with Congressional intent is evidenced by the limited time period for review of applications and by the fact that during the review process, and after it if the FCC has not acted, the applicant is deemed to be

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1/ In the Matter of Application of Entergy Technology Company for Determination of Exempt Telecommunications Company Status; FCC File No. ETC 96-2; adopted April 9, 1996, released April 12, 1996 (Entergy Order), at para. 27

an ETC. In establishing these time periods, Congress clearly did not contemplate the type of inquiry envisioned by many of the Commenters and the provision for grant of ETC status in the absence of FCC action clearly indicates that the determination of ETC status is the Commission's alone to make.[2/] The Commenters' proposals in this regard essentially urge a rewrite of the Section 34 when Congress has already clearly addressed these issues.

7. Were it Congress' intent that issues concerning the public interest, or state review should be a part of the application process, Section 34(a)(1) would certainly have contained some indication to that effect. Further, to the extent that Congress intended for there to be safeguards in regard to the issues raised by the Commenters they are provided for elsewhere in Section 34, in the 1996 Act or in other federal or state laws. Indeed Section 34 represents a careful and fair balancing of the interests at stake

8. Furthermore, in the Entergy Order, supra, the Commission properly rejected arguments that PUHCA requires prior state approval before entities may seek or obtain ETC status,

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[2/] In contrast, where Congress intended a dual role in execution of the 1996 Act, it expressly provided for one. In Section 252(e)(5), for example, Congress gave the FCC a mandate to act in cases where a state does not fulfill its obligations with regard to review of agreements for interconnection.

noting that "[r]equiring an applicant to obtain all state approvals -- including those that might only hypothetically be required -- notwithstanding that entry as an ETC might be accomplished independently of assets over which the states have jurisdiction, would obviously slow down holding company entry into telecommunications markets, and would frustrate the central purpose of Section 34 -- to remove PUHCA as a barrier to holding company entry into telecommunications markets. Entergy Order at para. 27. Southern agrees and urges the Commission to adopt this reasoning in implementing rules in this docket.

9. The suggestions that pole access obligations should be incorporated into the ETC far-reaching application process should also be rejected as beyond the statutory mandate and the scope of this proceeding. Nothing the plain language of Section 34(a)(1) suggests that pole access should be a factor in the determination of ETC status. Furthermore, issues related to pole access are addressed comprehensively in Section 224 of the 1996 Act. Implementation of these provisions are the subject of another, distinct rule making proceeding, CC Docket No. 96-98, which is underway. Clearly, the instant proceeding is not the appropriate forum for raising these issues. Finally, there are numerous infrastructure owners not subject to PUHCA restrictions on entry into telecommunications markets and it would be patently unfair

and nonsensical to single out registered holding companies for special obligations relating to pole access in the ETC context.

10. In light of the foregoing, Southern urges the Commission to continue to reject calls for a cumbersome multi-issue application process, as it did in the Entergy Order[3/] and to adopt its proposed rules concerning the scope of FCC review and public comment.

B. Content of Applications

11. BellSouth suggests in its Comments that the requirement of a "brief description of planned activities," set forth in proposed rule Section 1.4002, is inadequate and that applicants should be required to provide, at a minimum, details concerning facilities to be used and whether the ETC or an affiliate holding company will own them. Bell South at 12-14. SWBT suggests in its Comments that applicants should be required to include in their applications a listing and description of the types of service they plan to provide and the locations where they will be provided. SWBT at 2.

12. Southern opposes these suggestions and urges the Commission to adopt the rules regarding descriptions of proposed activities in their current format. As stated above, the issue

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[3/] Id., at para. 28.

in the application process is whether the ETC's business activities will fall within the scope of the categories contained in Section 34(a)(1). The Commission's proposal is correct in that such a determination is possible based on a brief description accompanied by a sworn statement from the applicant. Requiring extensive and extraneous detail concerning proposed activities would unnecessarily limit the ETC's flexibility and improperly force the divulgence of business information to competitors. Such a result would, in Southern's view, be contrary to the policies underlying the Act and should not be adopted.

2. Operative Definition of "To Be Engaged"

13. Section 34(a)(1) provides that ETC status is available to entities determined by the Commission "to be engaged...in the business of providing [qualifying services]." In its Comments, BellSouth suggests that the Commission's rules should condition grant of ETC status upon the actual provision of the services for which the ETC was formed within a reasonable period of time following grant. BellSouth at 11-12. Southern opposes such a requirement and urges the Commission to maintain its earlier adopted operative definition of "to be engaged":

> ...established for the exclusive purpose of providing such services at the time it files its application with [the] Commission.
>
> Entergy Order, at para. 30.

Such an interpretation is consistent with the purpose of Section 34 in that it provides flexibility to ETCs in the implementation of their business plans. The condition urged by BellSouth would place an unwarranted burden upon ETC's to commence activities within some undefined "reasonable period of time," under peril of losing their ETC status. Such a condition is likely to chill or hinder competition, rather than foster it as BellSouth contends, and should not be adopted.

3. Procedures Regarding Material Change in Facts

14. Several parties have submitted Comments concerning notice and comment on material changes in the facts underlying ETC status. Bellsouth argues that the rules should provide an opportunity for comment with regard to such matters and that entities granted ETC status to date should be subject to the proposed notification requirements. BellSouth at 14-15. Southern disagrees that the rules should provide for notice and comment on ETC notice of material change in circumstances. The FCC has the authority to place matters on public notice and to solicit comment thereon when, in its discretion, it is

appropriate to do so. There may be instances in which changes in circumstances are so unusual or sweeping as to warrant such an opportunity. In light of the FCC's authority, there is no need for an automatic comment provision and Southern is concerned that such a provision could be used as a vehicle for specious challenges to ETC status, thereby hindering competition by ETCs. Accordingly, Southern urges the Commission not to adopt BellSouth's proposal.

15. With respect to the applicability of the notice requirements, the Commission has previously held that, in accordance with language of Section 34(a)(1), the rules implementing that section will apply only to applications filed after the rules become effective. Entergy Order, at para. 31. The notice requirements ultimately adopted by the Commission must apply in accordance with this directive and BellSouth's proposal must be rejected.

16. Further, Southern agrees with the position expressed by Cinergy in its Comments regarding obligations in the event of changes in material fact. Cinergy at 4. Specifically, Southern agrees that such obligations should only go to facts set forth under proposed rule Section 1.4002(a)(2) and not to the brief description of activities required under Section 1.4002(a)(1). Such an interpretation is appropriate and will permit ETCs to

respond to market demands and changes without undue, and unnecessary, restriction on their qualified business activities.

4. Reporting/Disclosure Requirements

17. BellSouth has also suggested to the Commission that ETC's be required to file ongoing reports with the Commission regarding status of development of the ETC's business. BellSouth at 8-9. ACSI contends that ETC's should be required to provide copies of pole access agreements between itself and any utility affiliate to competing telecommunications carriers. ACSI at 9. Southern opposes the consideration of BellSouth's and ACSI's suggestions as being beyond the scope of this proceeding, in that they consist of proposals for the imposition of ongoing obligations following determination of ETC status, rather than the application process. Further, Southern views the suggested reporting requirements as excessive and not authorized by Section 34. Although Section 34 does provide for reporting and disclosure to the FCC and to state agencies, (Sections 34(f),(l) and (m)), the section also contains provisions to keep the information obtained thereby confidential. Southern urges the Commission to implement similar measures in any regulations it ultimately adopts regarding reporting and disclosure.

5. Regulatory Parity

18. BellSouth and CBT have suggested in their Comments that public utility holding companies and/or ETC affiliates are comparable or equivalent to LECs for regulatory purposes and should be subject to similar treatment. Bellsouth contends, for example, that cost allocation measures applicable to LECs under existing rules should be eliminated as part of "regulatory parity" with ETCs. BellSouth at 5-6. CBT argues in its Comments that accounting safeguards applicable to LECs under Parts 32 and 64 of the FCC's rules should similarly be applied to ETCs. CBT at 3.

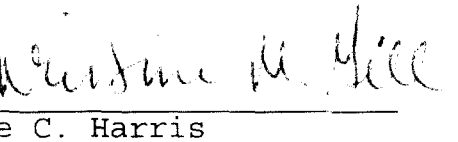
19. Southern urges the Commission to disregard these proposals as being well beyond the scope of this proceeding. Southern also wishes to state, however, that the attempt to equate ETCs and LECs is misplaced. Rather than incumbents with a dominant position in the telecommunications market, ETCs are new entrants in an environment which grows increasingly competitive each day. The policies which underlie the regulatory treatment of LECs, therefore, cannot be meaningfully applied to ETCs and the Commission should disregard any such suggestions.

III. CONCLUSION

20. The Commission's proposals represent an appropriate implementation of the ETC application process, and are consistent with both the plain language and the Congressional intent behind Section 34(a)(1). Although many of the Comments filed in this proceeding seek to raise ancillary issues or to depart from the statutory mandate, Southern urges the Commission to adopt the rules as proposed and to provide clarification of the extent of ETC obligations regarding material changes in circumstances, in accordance with its earlier filed Comments.

WHEREFORE THE PREMISES CONSIDERED, the Southern Company respectfully requests that the Commission act upon its Notice of Proposed Rulemaking in a manner consistent with the views expressed herein.

Respectfully submitted,

By: 

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